The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants.

NO. 09-cv-05456-BHS

DEFENDANTS' MOTION TO STRIKE AND DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTED ON MOTION CALENDAR:

July 22, 2011

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FILED UNDER SEAL PURSUANT TO JOINT MOTION AT DKT. 220

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I. MOTION TO STRIKE

Defendants move this Court to strike the first and second declarations of Jared Haynie, and Exhibits 4 and 5 to the Hanynie declarations, and to strike Exhibit 3 to the declaration of REDACTED, as inadmissible evidence.[1]

Plaintiffs must prove the reasonable probability of violent threats, harassment, and reprisals against Washingtonians who signed the R-71 petition. In support of their summary judgment motion on this critical issue, plaintiffs try to overwhelm the Court and defense counsel with a plethora of unauthenticated and hearsay emails, web site postings, internet news sites, and You Tube videos that generally concern opposing views on same sex civil unions.

Rather than establishing bases for admitting this evidence, plaintiffs have simply attached them to two declarations from legal counsel Jared Haynie, and one from plaintiff REDACTED, a public figure who maintains the public website of Protect Marriage Washington (PMW). Defendants hereby move to strike these declarations and their exhibits because of plaintiffs' failure to provide any foundation for their admission into evidence, as required by Fed. R. Civ. P. 56(c)(4), and Fed. R. Evid. 901, 902 and 807. This motion to strike is incorporated into this brief pursuant to Civ. R. 7(g), and is based in substantial part on the declaration of Aaron Williams submitted herewith.

A. Plaintiffs Bear The Burden Of Establishing The Authenticity And Admissibility Of The Evidence They Offer In Support Of The Motion

Fed. R. Civ. P. 56(c)(4) mandates that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." The same requirements apply to documents and materials attached to summary judgment affidavits. *Id.* Evidence offered in connection with summary judgment motions

[1] Dkt 210-1 to Dkt. 210-7; Dkt. 211-1 to Dkt. 211-3; Dkt. 212-1 to Dkt. 212-3; Dkt. 213-1 to Dkt. 213-2; Dkt 209-4. See Proposed Order Granting Motion to Strike.

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faces the same obstacles and burdens a party has at trial. Unauthenticated or inadmissible evidence is stricken from the record. *Hall v. CIA*, 538 F. Supp. 2d 64, 71 (D.C. 2008).

B. Plaintiffs Have Not Authenticated The Documents Attached To The Haynie Declarations Or The Emails Allegedly Received By Plaintiff REDACTED

Under Fed. R. Evid. 901 the proponent of evidence must prove that a document is what it purports to be. *Demirchyan v. Gonzales*, 2010 WL 3521784 (C.D. Cal. 2010). As sponsoring witnesses, Messrs. Haynie and REDACTED must detail their personal knowledge and experience with the generation, maintenance, and integrity of the documents and internet materials they attach to their declarations. Fed. R. Evid. 901(b)(1); *Allan v. Greenpoint Mortg. Funding*, 730 F. Supp. 2d 1071, 1075-76 (N.D. Cal. 2010); *In re Bedrock Mktg.*, 404 B.R. 929, 937 (D. Utah 2009). The requisite details for authenticating and admitting evidence cannot be included in a summary judgment reply brief. *See Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996).

Mr. Haynie provides no information to establish the authenticity of the newspaper, magazine, and web site materials attached as Exhibit 4 or the You Tube and social media postings attached as Exhibit 5. These materials are not self-authenticating under Fed. R. Evid. 902.

> Courts do not treat printouts from internet websites as self-authenticating or admit them without foundation or authentication. The court in *In re Homestore.com., Inc. v. Securities Litigation,* 347 F. Supp. 2d 769, 782-783 (C.D. Cal. 2004), states in this regard:
>
> > Printouts from a web site do not bear the indicia of reliability demanded for other self authenticating documents under Fed. R. Evid. 902. To be authenticated, some statement or affidavit from someone with knowledge is required; for example, Homestore's web master or someone else with personal knowledge would be sufficient.

Adobe Sys., Inc. v. Christenson, 2011 WL 540278, at *9 (D. Nev.); *see also In re Easysaver*

Rewards Litig., 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010) (screen shots and materials taken from websites are not self-authenticating; information taken from internet lacks reliability and must be properly authenticated); *Allan*, 730 F. Supp. 2d at 1075-76 (sponsoring witness' affidavits must personally identify and authenticate pages from websites relied on to support claims); *Hall*, 538 F. Supp. at 68 (declarant must have "personal knowledge" of events and documents attached to written testimony).

Similarly, Mr. REDACTED provides no authenticating information about the emails and photographs comprising Exhibit 3 that were generated by other persons. Instead, he labels them generally as "threatening" or "vandalism" without providing circumstances or context that proves his assertions or establishes his declaration is based upon personal knowledge. The Court should strike these declarations and exhibits.

C. Exhibits 3, 4, And 5 Are Inadmissible Hearsay For Which Fed. R. Evid. 807 Provides No Exception

On June 29, 2011, the day they filed their summary judgment pleadings, plaintiffs provided for the first time a notice of intent to offer all their summary judgment evidence pursuant to Fed. R. Evid. 807. Known as the "residual exception" to the rules barring hearsay, Rule 807 states:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807 is the only hearsay exception cited by plaintiffs as grounds for admitting the third-party statements and documents comprising Exhibits 3, 4, and 5 to the REDACTED and Haynie Declarations. As a matter of law, "this exception is not to be used as a new and broad hearsay exception, but rather is to be used rarely and in exceptional circumstances." *United States v. Bonds*, 608 F.3d 495, 500 (9th Cir. 2010); *Fong v. Am. Airlines*, 626 F.2d 759 (9th Cir. 1980).

To justify admission under Fed. R. Evid. 807, the proponent must establish five elements: (1) the hearsay itself must have circumstantial guarantees of trustworthiness; (2) the hearsay must be material; (3) the hearsay must be more probative than any other evidence the proponent can procure; (4) admission of the hearsay must serve the interests of justice; and (5) the proponent must notify the other parties to the case of the intended use of each hearsay statement and the names and addresses of each hearsay declarant so that the opposing side(s) have a fair opportunity to evaluate and challenge the hearsay. *Fong*, 626 F.2d at 763; *Huff v. White Motor Corp.*, 609 F.2d 286, 290-91 (7th Cir. 1979). Exhibits 3, 4, and 5 fail to meet each of these requirements.

1. The Hearsay In Exhibits 3, 4, And 5 Lacks Circumstantial Guarantees Of Trustworthiness

Fed. R. Evid. 807's first element requires that plaintiff establish for each individual statement in Exhibits 3, 4, and 5 the "indicia of trustworthiness" that justify its admission. *United States v. Canan*, 48 F.3d 954, 960 (6th Cir. 1995). Trustworthiness for each hearsay statement must be evident in the statement itself and not proven by other evidence. *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000); *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995). Factors demonstrating hearsay is *untrustworthy* are statements that were not made under oath, were not made based upon personal knowledge, were uncorroborated or not spontaneous, and were not subject to cross-examination. *E.g., Land Grantors in Henderson, Union, & Webster Counties v. United States*, 86 Fed. Cl. 35, 41-43 (2009); *United States v.*

Fredericks, 599 F.2d 262, 265 (8th Cir. 1979); *Aamco Transmissions v. Baker*, 591 F. Supp. 2d 788, 799 (E.D. Pa. 2008). If the speaker(s) of the hearsay statements are not identified, the evidence is not trustworthy under Fed. R. Evid. 807. *Partido Revolutionaries Dominico v. Pradido Revoludionaries Dominico*, 311 F. Supp. 2d 14, 19 (D.D.C. 2004). The hearsay contained in Exhibits 3, 4, and 5 is not admissible under FRE 807 because of these factors.

2. Exhibits 3, 4, And 5 Lack The Probative Quality Of Sworn Testimony By The Sources Quoted In These Exhibits

Fed. R. Evid. 807 will not provide the basis for admitting hearsay statements when the offeror of the hearsay had the option of obtaining the same evidence from other sources. This is particularly true as to newspaper and magazine articles and audio or TV programming, which accounts for all of Exhibits 4 and 5, and for the emails authored by unknown persons in Mr. REDACTED's Exhibit 3.

Thus, in *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), the court excluded newspaper articles quoting the defendant making remarks dismissive of alleged civil rights violations by police officers. Holding that Fed. R. Evid. 807's mandate is a "best evidence requirement," the court held that it would be error to admit the newspaper or magazine accounts because "testimony from the reporters themselves would have been better." *Larez*, at 946 F.2d at 644. Furthermore, where, as in this case, plaintiffs fail to show any efforts to obtain the more probative evidence from the declarants of the hearsay, the courts have excluded the hearsay under Fed. R. Evid. 807. *Id.* at 643; *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 743 (7th Cir. 1997). This result has been followed by many federal courts. *E.g.*, *Demirchyan,* 2010 WL 3521784 at *11; *ACLU v. City of Las Vegas*, 13 F. Supp. 2d 1064, 1070 (D. Nev. 1998); *In re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. 1369, 1374 (N.D. Cal. 1995). Finally, even when court rulings have precluded live testimony from the sources of the hearsay statements, newspaper and news service accounts of those hearsay statements or occurrences are excluded under Fed. R. Evid. 807. *Green v. Baca*, 226 F.R.D. 624, 639 (C.D.

Cal. 2005); *In re Cypress Semiconductor*, 891 F. Supp. at 1374-75 (1995).

The Haynie and REDACTED Declarations describe no efforts to obtain non-hearsay testimony from the sources of the hearsay offered as evidence of a reasonable probability of violence, threats, and retribution directed at signors of R-71 petitions. The contents of Exhibits 3, 4, and 5 are not "more probative" than any other evidence that plaintiffs could and should have obtained and must be excluded.

3. The Interests Of Justice Require The Rejection Of Exhibits 3, 4, And 5

Admission of the multiple hearsay contained in Exhibits 3, 4, and 5 in order to grant plaintiffs summary judgment will contravene the interests of justice. Demonstrating probable injury if the identities of R-71 petition signors are released is plaintiffs' burden in this case. To relieve them of that burden by allowing evidence of hearsay internet postings and emails – most of which have no relationship to R-71 or Washington State – would be unjust and contrary to the purposes of the evidentiary rules. "In both civil and criminal cases, our common law heritage has always favored the presentation of live testimony over the presentation of hearsay testimony by the out-of-court declarant." *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977). Where, as in this case, plaintiffs have opted not to obtain direct, non-hearsay evidence, Fed. R. Evid. 807 is not available because "admitting this evidence would give [plaintiffs] the unfettered ability to present a one-sided version of events, which [defendants] could not test through cross-examination." *Aamco Transmissions*, 591 F. Supp. 2d at 800.

4. Plaintiffs' Fed. R. Evid. 807 Notice Was Untimely And Deficient

This action has been pending since 2009. The majority of plaintiffs' Fed. R. Evid. 807 evidence dates back that far. In addition, defendants have had discovery outstanding that would require production of this evidence much earlier than June 29, 2011:

> [Fed. R. Evid. 807] requires the proponent to notify the adverse party of this or her intention to offer the evidence under this rule sufficiently in advance of the

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> trial or hearing to provide the adverse party with a fair opportunity to meet the evidence . . . The purpose of the notice requirement is to give adverse parties an opportunity to attack the trustworthiness of the evidence.

Piva v. Xerox Corp., 654 F.2d 591, 595-96 (9th Cir. 1981). The notice requirements of Fed. R. Evid. 807 are strictly construed. *Sours v. Glanz*, 24 F. App'x 912, 914 (10th Cir. 2001). Courts have rejected evidence offered under this Rule simply because a party has failed to disclose the names and addresses of all the hearsay declarants. *United States v. Mandel*, 591 F.2d 1347, 1369 (4th Cir. 1979); *United States v. Musel*, 421 F. Supp. 2d 1153, 1161 (S.D. Iowa 2006).

The offer of the hearsay in Exhibits 4 and 5 is both late and incurably incomplete. Defendants will have no opportunity at this point to conduct the investigation, interviewing and depositions needed to rebut evidence withheld until June 29, 2011. No identifying information for the hearsay declarants or for Exhibits 3, 4, and 5 was provided. Failure to provide notice is yet another basis to reject all alleged evidence offered under Fed. R. Evid. 807.

5. The Haynie Declarations And Exhibits 4 And 5 Contain Irrelevant Documents And Information

In addition to being authenticated and admissible, evidence must be relevant to the case. Fed. R. Evid. 401, 402. Plaintiffs' summary judgment pertains to the critical issue of whether there is reasonable probability of violence, threats, or reprisals against Washingtonians who signed or declined to sign R-71 petitions. Evidence of events or statements concerning gay marriage generally, about campaigns or controversies in other states, and about circumstances before 2009 are irrelevant and should be stricken.

6. The Court Should Strike Evidence From Undisclosed Witnesses

This Court entered a pre-trial scheduling order requiring that plaintiffs disclose all witnesses. The order provides that untimely disclosed witnesses will not be allowed. None of

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the hearsay declarants in Exhibits 3, 4, and 5 were disclosed as ordered. The testimony and documents associated with those witnesses must be stricken.

II. RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Introduction

The issue in this case is not whether the plaintiffs experienced harassment during the R-71 election. If that were the issue, it could be addressed by the police, or in a civil harassment or criminal proceeding. The issue is whether the plaintiffs are a minor group, so far outside the mainstream, that disclosure of its supporters will impede the exercise of Protect Marriage Washington's First Amendment right of association. *Doe v. Reed,* 130 S. Ct. 2811 (2010).

The answer to this question is already known. For two years, the names of over 850 PMW donors have been published on a State website. The disclosure has had no impact on PMW's right of association. PMW cannot identify a single donor that experienced harassment. Nor has it identified anyone who declined to sign the petition or donate due to fear of disclosure.

Now that the election has been over for nearly two years, disclosure of the petitions is even more unlikely to impact the plaintiffs' First Amendment right of association. Only before an election is there a reasonable possibility that harassment might infringe on the right of association by discouraging people from signing petitions or participating in the campaign. *Doe*, 130 S. Ct. at 2822 (Alito, J., concurring).

B. Counter Statement Of The Case

1. State Disclosure Of PMW Supporters

PMW is not a new political group. PMW registered as a Washington political committee in May 2009, collected signatures statewide on the R-71 petition, and campaigned statewide in anticipation of the 2009 November general election.

Since June 2009, the name, city, state, and zip code of over 850 individuals and businesses that contributed to PMW have been posted on a publically searchable database by

the Washington Public Disclosure Commission. Dkt. 198 at ¶16. If $100 or more was donated, the Commission also posted the contributor's occupation and employer. *Id. at* ¶¶16-17. Fearing that disclosure of supporters would result in harassment, PMW moved to seal the names. The Commission found that PMW was unable to show that any harassment was caused by disclosure, and therefore denied the request. *Id.* at ¶21.

No one who simply donated money to PMW's R-71 campaign, and therefore had their name and address posted on the internet by the Public Disclosure Commission, is alleged to have suffered retaliation or harassment that deterred the exercise of the First Amendment right of association. Similarly, no one who simply signed the petition is alleged to have suffered retaliation or harassment that deterred the exercise of the First Amendment right of association.

2. Plaintiffs' Allegations Of Harassment

The plaintiffs' allegations fall into four categories: (1) verbal or written comments that did not cause witnesses to feel threatened or call the police; (2) concerns resolved by the police; (3) experiences witnesses admit arose outside the context of the R-71 campaign or may not be related to R-71; and (4) allegations relating to California's Proposition 8.

a. Verbal And Written Exchanges And Gestures That Were Not Perceived As A Threat

The plaintiffs cite few examples of verbal or written exchanges in Washington. A number of plaintiffs' allegations cite the testimony of REDACTED , one of the primary spokespersons for the R-71 campaign. Plaintiffs contend she experienced "loss of employment and job opportunities." Dkt. #209 at 9, (citing Ex. 2 ¶¶ 36–44). REDACTED filed an application to volunteer at SafePlace, a women's shelter. A SafePlace representative telephoned Ms. REDACTED to ask about her public, "anti-gay" stand, because the SafePlace staff includes lesbians and transgender individuals. Pl. Ex. 2 at ¶ 40. Ms. REDACTED's application was not denied. Rather, as she admits in her declaration, she chose to withdraw her application. *Id.* at 8, ¶ 43. Plaintiffs also claim that Ms. REDACTED received "hate mail." Dkt.

#209 at 9, (citing Ex. 4). Ms. REDACTED received one sheet of paper, stating "Christian bigot." *Id.* There was nothing threatening contained in the letter. *Id.* Finally, plaintiffs contend Ms. REDACTED suffered "acts of intimidation through photography." Dkt. 209 at 9. A young woman used her cell phone to take a picture of REDACTED and REDACTED while they were in a parking lot gathering signatures, and stated that she was going to post the picture on the internet. Ms. REDACTED told the young woman not to post the picture. Dkt. 214 at 186. The REDACTED did not check to see whether the picture was posted on the internet, and did not feel the need to contact the police. *Id.* at 187.

Plaintiffs allege that "activists lashed out, promising emotional harm to supporters' children by threatening to convert them to homosexuality." Dkt. 209 at 13, citing Ex. 1-9, at 11:25-12:20. The citation is to the testimony of Pastor REDACTED, who testified that there were a few notes left in front of his church, stating "nothing will come of this for you" and "your children will be just like us." Ex. 1-9 to Dkt. 209 at 11:25 to 12-7. When asked whether he believed his parishioners or the church were being threatened with harm, Pastor REDACTED answered: "Of course I don't think so. I didn't have that kind of fear." *Id.* at 16:12-16.

Plaintiffs contend that REDACTED, a PMW campaign organizer, was told he deserved to die. Dkt. 209 at 11, (citing Ex. 1-8, at 19:5-6, 19:19-24). REDACTED testified that after an R-71 rally at an intersection in Vancouver, Washington, a man said "what you guys are doing is wrong. You guys deserve to die. Everybody deserves to live." *Id.* at 17:2-6; 19:13-24. REDACTED saw a police officer in the vicinity, but chose not to contact him. *Id.* at 21:19-25. Plaintiffs also claim REDACTED witnessed "lewd and perverse demonstrations." Dkt. 209 at 9, (citing Ex. 1-8 at 22-24). The cited demonstration was three men in thong bathing suits walking through a public site during an R-71 rally. *Id.* at 22-24.

A number of plaintiffs' citations were to written or verbal comments received by REDACTED, the head of REDACTED. Dkt. 209, at 9 (citing Dkt. 2-4); Ex. 1 at 10 (citing 1-11 at 58-59, 86-87). Multiple citations are made to "intimidating" phone calls

received by Mr. REDACTED, from a single caller, Krystal Mountaine. REDACTED also received calls from Ms. REDACTED, and reported the calls to the Lacey, Washington police department. Dkt. 197-4, Ex. 9. After an officer spoke with Ms. REDACTED, the calls stopped. *Id.* at 54:15 to 55:4.

b. Concerns Resolved By The Police

Nearly all of the plaintiffs' citations to internet postings in Washington are citations to a single blog site. Dkt. 209, at 9 (citing Ex. 4-195, 4-83, 4-84), 10 (citing 4-189), at 11 (citing 4-195, 3-1 at 13), 12 (citing 4-84, 3-1), 13 (citing Ex. 4-189). REDACTED reported his concerns about the blog to the police. *Id.* at 56:25 to 57:19. Bellingham Police Detective Allan Jensen contacted the blogger, John Bisceglia, and investigated the complaint. Dkt. 199, Ex. A. As a result of the investigation, Mr. Bisceglia apologized and agreed to remove any post that might offend others. *Id.* at 5. No complaints were made about the blog after Detective Jensen handled the matter. The blog is no longer on the internet.

Plaintiffs cite a phone message heard by REDACTED , an employee of Pastor REDACTED's church. The caller stated: "I'm going to kill the pastor." Dkt. 209 at 10. He did not state why he was making the threat, and did not mention R-71 or any other issue. In response to a call from Ms. REDACTED, two Redmond police officers investigated the message. Ms. REDACTED felt the Redmond police were "absolutely" doing their best. Dkt. 214 at 430.

Plaintiffs allege that a "perpetrator threatened to kill" a supporter's "child and the whole family." Dkt. 209 at 13 (citing Ex. 1-3). A local newspaper ran a story about REDACTED REDACTED's Tea Party affiliation and legislative campaign, and mentioned that she signed the R-71 petition. The next day an unidentified caller told her 13-year-old son "I will kill you and your family" and then hung up. Dkt. 197-3, Ex. 7 at 17:19 to 18:18. Ms. REDACTED and her son admitted in statements to the police that the caller said absolutely nothing to indicate whether the threat was related to R-71, Ms. REDACTED's Tea Party activism, or any other issue or conflict with family members. Dkt. 201, Ex. A at 4-5. The police responded to Ms. REDACTED's call within five

minutes. *Id.* at 19:13-20; Dkt. 201, Ex. A at 1. Officer Andrew Mehl explained how to deal with any future callers, and assured her that he would do extra patrols of the house. Dkt. 201.

Plaintiffs' contention that "there is evidence of at least one physical assault against the thirteen-year-old child of a prominent supporter" is similarly misleading. Ms. REDACTED testified that months after the conclusion of the election, she traveled with her son from Everett to Ocean Shores for a Republican Party conference. Dkt. 205-4, Ex. M at 41:23 to 50:25; Dkt 214, Ex. 1 at 106:2-15. While her son was standing alone outside their motel, a man and a woman drove by, and the woman tossed a snack size container of applesauce out the window. *Id.* The applesauce got on Ms. REDACTED's son's clothing. Plaintiffs have offered nothing to indicate that this Ocean Shores couple knew REDACTED was a defeated candidate in a district over 100 miles away, or to show that they knew or cared what her stance was on R-71.

c. Experiences Witnesses Admit Arose Outside The Context Of The R-71

Plaintiffs rely heavily on alleged incidents that pre-date the existence of R-71, and therefore are clearly unrelated. REDACTED Decl. at ¶12. For example, plaintiffs contend a sign was pointed at a pastor's head, saying "throw rocks here," during a "Day of Silence" high school students held to show support for gay classmates. Dkt 197-2, Ex. 6 at 24:14 to 26:21; Dkt. 197-1, Ex. 1 at 20:1 to 21:1. REDACTED held a rally to object to the students' event. This occurred a year before the R-71 petition existed, and had nothing to do with same-sex partnership. When asked whether anything was thrown at him, Pastor REDACTED stated, "Oh, no. I mean, that wouldn't have happened." *Id.* at 28:17-18. According to Pastor REDACTED, the presence of the police at his rally helped to prevent any violence. *Id.* at 35:11-19.

d. Allegations Relating To California's Proposition 8

The bulk of plaintiffs' citations relate to incidents that occurred in California, as a result of Proposition 8. Because PMW has a full history in Washington, including over two years of public disclosure of the names and addresses of over 850 of its contributors, evidence

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regarding California is irrelevant. Even if it were admissible, the evidence would be insufficient to meet the plaintiffs' burden of establishing that disclosure will result in serious harassment or reprisals that will impact their First Amendment right of association.

If the Court permits the plaintiffs to rely on the California declarations, in violation of the Joint Scheduling Order, the Court will find that the alleged "harassment" amounts to little more than hurt feelings. For example, one declarant related that "members of the country club have made rude comments to me about my sign [supporting Proposition 8]," and that gay members of the country club "used to greet me warmly; now, they give me looks of disdain and do not greet me as I pass." Dkt. 4, Ex. 13 at 52 ¶ 7. Another complained that her pastor "told her to find another church." She was upset that her pastor "was not going to tell [the congregation] how to vote" on Proposition 8, even though she lobbied him to and thought he was required to. Dkt. 4, Ex. 13 at 212 ¶¶ 4-6. All of the declarations contain similarly trivial allegations.

Like Washington, California has disclosed the names of contributors to the "traditional marriage" organizations campaigning for Proposition 8. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (2009). Although the names have been publically available since 2009, the plaintiffs have not offered any evidence that the contributors suffered any harassment following the disclosure, or that the threat of harassment has in any way impacted First Amendment associational rights.

C. ARGUMENT

1. The Plaintiffs' Motion Raises Issues Of Material Fact

The Federal Rules permit summary judgment when there is "no genuine issue as to any material fact" and the petitioners are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When parties file cross motions for summary judgment, asserting that there are no issues of material fact, it "does not vitiate the court's responsibility to determine whether disputed issues of material fact are present." *Fair Housing Council of Riverside Cnty, Inc. v.*

Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). Because the material plaintiffs rely on raises issues of material fact, their request for summary judgment cannot be granted under Fed. R. Civ. P. 56(c). Rather than relying on the undisputed testimony of their witnesses, plaintiffs opted to rely on hundreds of citations to web pages and blogs without proper authentication. REDACTED Decl. In addition, plaintiffs rely on the testimony of out-of-state, confidential declarants who were not disclosed as witnesses pursuant to the Joint Scheduling Order entered by this Court. Dkt. 128. Because the identity of these declarants was never disclosed, the defendants have had no opportunity to conduct discovery or obtain contrary evidence.

Since the defendants dispute the authenticity and content of the web pages and blogs, and dispute the testimony of the undisclosed witnesses, "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 332 (1990), (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The inference to be drawn from the disputed material is that despite the fact that the names of donors to PMW have been public information for nearly two years, Washington has not seen harassment, threats, or reprisals, that have impaired anyone's First Amendment right to associate, or deterred anyone from associating. To the extent any blogger or prank caller made anyone feel uncomfortable, our state and local police provided immediate assistance. As a result, the individuals that troubled the plaintiffs' spokespersons and campaign leaders voluntarily stopped their behavior. Evidence regarding California is not relevant, but if it were, the inference to be draw is that California's state and local police were likely to have been just as responsive, and equally successful in persuading people to behave in a civil manner.

2. PMW Has Not Met Its Burden To Show That Disclosure Will Result In Serious Threats, Harassment, Or Reprisals That Will Impact The Exercise Of Its First Amendment Rights

The plaintiffs' motion fails to satisfy the test established by the United States Supreme Court. The Supreme Court has held that a minority party or group may be exempt from

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disclosure if there is a "reasonable probability of serious and widespread harassment that the State is unwilling or unable to control." *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring). The test reiterates the Court's prior holding that the State's important interest in disclosure can be overcome only "where the threat to the exercise of First Amendment rights is so serious and the state's interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." *Buckley*, 424 U.S. 1, 71 (1976).

In determining whether protection of a group's First Amendment right of association outweighs the State's interest in disclosure, the courts consider not only the nature of the harassment, but also the nature of the group that is being harassed, and how harassment will impact that particular group's ability to associate. It is typical to experience harassment and threats during an election. Dkt. 200; Dkt. 207. For most groups, such behavior does not cripple the group's ability to associate. Therefore, the harassment is appropriately addressed in civil or criminal cases, not through the extraordinary remedy of applying the First Amendment to prohibit public disclosure of election-related information.

However, "'from time to time throughout history, persecuted groups have been able to criticize oppressive practices and laws either anonymously or not at all.'" *Doe,* 130 S. Ct. at 2831 (Stevens, J. concurring), quoting *McIntyre v. Ohio Elections. Comm'n,* 514 U.S. 334, 342 (1995). When such a group is reviled, fear of exposure causes people to decline to associate with or contribute to the group. The Supreme Court has held that the risk of harassment of such "'minor parties'" may require exemption from otherwise permissible disclosure requirements, to preserve the First Amendment right of association. *Doe,* 130 S. Ct. at 2821, (quoting *Buckley* 424 U.S. at 74).

In reviewing this case, the Supreme Court commented that the plaintiffs offered "scant evidence" in support of their claim. *Doe*, 130 S. Ct. at 2821. "Indeed, what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps." *Id.* As the Court noted, the State has released several petitions in recent years, "without incident." *Id.* The

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circumstances the Supreme Court has determined warrant exemption from public disclosure are dramatically different than the circumstances presented by PMW.

a. Exemption From Disclosure Is Applied Only To Avoid Harassment Of Minor Parties, Not Mainstream Political Organizations Like PMW

In each case in which the Supreme Court exempted a party from a legitimate state disclosure requirement, the party or group was a minor organization whose ability to associate would be severely impaired by disclosure. "[T]he governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election." *Buckley*, 424 U.S. at 70.

For example, the Supreme Court addressed the minority interests of African-Americans in the 1950's who were challenging segregation in the deep south. *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958). In contrast to PMW, the organization did not simply offer evidence that its spokespersons might be harassed. Instead, it "made an uncontroverted showing" that its "rank and file" members suffered loss of employment, threat of physical coercion and other manifestations of public hostility that would cause individuals to decline to associate with the organization. *Id.* at 462. *Brown v. Socialist Workers*, 459 U.S. 87 (1982), also involved the associational rights of a minor political party. The Ohio Socialist Workers Party (SWP) was a tiny, radical group of approximately sixty members, working toward the unpopular goal of abolishing capitalism and establishing socialism. *Brown,* 459 U.S. at 88. The Court noted that in 1980, the SWP's U.S. senatorial candidate received just one-point-nine percent of the total vote. *Id.* at 89. In *Brown*, the Socialist Workers Party proved "specific incidents of private and government hostility," including destruction of members' property, extensive government harassment, and the firing of shots at the SWP's office. *Id.* at 99. Many of the SWP's members lost their jobs because of their membership in a highly disliked organization. *Id.* *Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (2004), applied the decision in *Brown* to the Freedom Socialist Party, a "minor political party" that describes itself as dedicated to

establishing a socialist government. *See Freedom Socialist Party v. Bradbury*, 48 P.3d 199 (Or. 2002).

Similarly, disclosure of contributors was found to be likely to impede the ability of the Communist Party, a "minority political group," to exercise its right of association. *Fed. Elec. Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 417 (2nd Cir. 1982). The Court noted that the Communist Party was so far out of favor that it was "illegal in many states simply to be a member of the Communist Party" or to make a donation. *Id.* at 422. When disclosure "causes potential supporters of an organization to refrain from engaging in protected activity," the First Amendment right of association is endangered. *Id.* at 423.

The plaintiffs claim their views in favor of traditional marriage are "extremely unpopular." Dkt. 209 at 15. In reality, plaintiffs are a mainstream political organization, not an ostracized minor group. In fact, PMW successfully gathered over 130,000 R-71 petition signatures statewide. *Doe,* 130 S. Ct. at 2816. They obtained 838,842 votes in the R-71 election, and lost by a narrow margin of 53% to 47%. *Id.* PMW's position won the majority of the vote in 29 of Washington's 39 counties. Dkt. 207, Ex. B. Losing a close election does not make PMW a minor party, comparable to the NAACP, Socialist Workers Party or Freedom Socialist Party.

Plaintiffs contend that "declarations of state" attack the views of those opposing same sex marriage. Dkt. 209, at 15. In reality, Washington, like the vast majority of states, prohibits marriage for couples "other than a male and a female."[2] Washington's Supreme Court held

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[2] Ala. Code § 30-1-19 (1975); Alaska Stat. § 25.05.011 (2010); Ariz. Rev. Stat. § 25-901 (2011); Ark. Code Ann. §9-11-109 (2010); Colo. Rev. Stat. § 14-2-104 (2011); Del. Code Ann. tit. 13, § 101 (2011); Fla. Stat. § 741.212 (2011); Ga. Const. art. 1, § 4 (2011); Haw. Rev. Stat. § 572-1 (2011); Idaho Const. art. III, § 28 (2011); Ill. Comp. Stat § 750 5/201 (2011); Ind. Code § 31-11-1-1 (2011); Kan. Const. art. 15, §16 (2010); Ky. Rev. Stat. § 233 A (2010); La. Const. art.12, § 15 (2011); Me. Rev. Stat. tit. 19-A, § 650 (2010); Md. Code Ann. Fam. Law § 2-101(2011); Mich. Const. art. 1, § 25 (2011); Minn. Stat. § 517.01 (2011); Miss. Const. art. 14, § 263A (2011); Mo. Rev. Stat. § 451.022 (2011); Mont. Code Ann. § 40-1-103 (2010); Neb. Const. art. 1, § 29 (2010); Nev. Rev. Stat. § 122.020 (2011); N.C. Gen. Stat. § 51-1 (2010); N.D. Cent. Code § 14-03-01 (2011); Ohio Rev. Code Ann. § 3101.01 (2011); Okla. Const. art. 2, § 35 (2010); Or. Const. art. XV, §5a (2011); Pa. Stat. Ann. § 1102 (2011); S.C. Const. art. XVII, § 15 (2010); S.D. Const. art. 21, § 9 (2011); Tenn. Const. art. 11, § 18 (2011); Tex. Fam. Code Ann. § 2.001 (2011); Utah Code Ann. § 30-1-4.5 (2011); Va. Const. art. 1, § 15-A (2011); Wash.

that our State's statutory prohibition on same-sex marriage complies with the Washington constitution. *Andersen v. King County*, 138 P.3d 963 (2006).

The idea that supporters of traditional marriage can claim minority status was specifically rejected by the federal district court in California. ProtectMarriage.com, a group advocating for "traditional marriage" in the context of California's Proposition 8, claimed it was a minor party. The court held that in "light of clearly established precedent, this Court is unable to say . . . that the Plaintiffs' potential burden is even remotely comparable [to that in *Brown v. Socialist Workers Party*]." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1214 (2009). There "is surely no evidence that the seven million individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or that their beliefs would be considered unpopular or unorthodox." *Id.* at 1215.[3]

This Court should reject plaintiffs' invitation to depart from the United States Supreme Court, and prohibit access to public records based on a threat of harassment to a group that that clearly is not a minor party, unable to withstand the impact of typical election events.

b. "Flexibility In The Proof Of Injury" Still Requires A Showing Of The Level Of Harm Demonstrated In *NAACP v. Alabama*

Citing *Buckley*, plaintiffs ask for "flexibility in the proof of injury." Dkt. 209 at 8. In *Buckley*, a few people refused to contribute to a minor party because they feared disclosure. *Buckley*, 424 U.S. at 72. Despite this proof of harm, the Court held that "the substantial public interest in disclosure . . . outweighs the harm generally alleged." *Id.* at 72. The Court explained that it will not recognize a blanket exemption even for minor parties, but will allow the injury to be shown in a variety of ways.

Rev. Code § 26.04.020(1)(c) (2010); W.Va. Code § 48-2-104 (2011); Wis. Const. art. 13, § 13 (2011); Wyo. Stat. Ann. § 20-1-101 (2011).

[3] In reviewing a district court order allowing live audio and visual streaming of a Proposition 8 trial, the Supreme Court held that the local rule allowing broadcast was improperly adopted. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). Because the local rule was invalid, broadcast was not permitted. *Id.* at 714-715. It is important to note that the Supreme Court did not close the trial, or otherwise limit the attendance of the public.

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> The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views. Where it exists the type of chill and harassment identified in *NAACP v. Alabama* can be shown.

Buckley, 424 U.S. at 74. The threat to the exercise of First Amendment rights must be "so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." *Buckley*, 424 U.S. at 71. In this case, the type of chill and harassment identified in *NAACP* simply does not exist. The witnesses offered by PMW are sponsors of R-71, who made every effort to expose the public to their political opinions. Their experiences do not demonstrate a probability that "rank and file" signers of the petition would be subject to harassment sufficient to persuade them not to associate with PMW.

The Supreme Court justices have also indicated that the First Amendment will not be used to prohibit distribution of information to the public unless there is a showing that the harassment will not be addressed by the State. As Justice Sotomayor stated in a concurring opinion joined by Justices Stevens and Breyer, the First Amendment is not applicable unless "there is serious and widespread harassment that the State is unwilling or unable to control." *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring). In a concurring opinion joined by Justice Breyer, Justice Stevens reiterated that to succeed, PMW must show "significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures." *Id.* at 2831 (Stevens, J., concurring). Justice Scalia wrote that "the First Amendment does not prohibit public disclosure" and emphasized that "[t]here are laws against threats and intimidation." *Id.* at 2832, 2837. Thus, five justices have indicated that if the State is willing and able to control the harassment, the First Amendment does not prohibit public disclosure. As is evident in the deposition testimony of plaintiffs' witnesses, as well

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as the police reports offered by the State, Washington's state and local police have been willing and able to respond to all allegations of harassment. *See, e.g.* Dkt. 199, 201.

c. Only "New Parties" With "No History" May Rely On The Experiences Of Other Groups To Establish A Reasonable Probability Of Harm

Unable to show a reasonable probability of harm in Washington, plaintiffs primarily rely on internet pages relating to California's Proposition 8. Williams Decl. at ¶ 11. Resort to events in California, in an entirely different election, is improper. In *Buckley*, the Supreme Court stated that "new parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Buckley*, 424 U.S. at 74. Since there is an abundance of evidence regarding PMW's history in Washington, including concrete statistics showing the near success of their election campaign, reliance on allegations regarding other organizations is not permitted under *Buckley*.

The history of PMW in this state provides direct evidence of what happens when the names of its supporters are publically disclosed. Since June 2009, the Washington Public Disclosure Commission has disclosed the names, addresses, contribution amount, and even some employment information, regarding over 850 donors to PMW. Dkt. 198 ¶¶ 16-18. The information is posted on the internet, in a searchable database. *Id.* The public can view the entire list, run a search of the database to find contributors from a particular city or zip code, or run a search to locate contributors employed by a particular business or in a specific occupation. *Id.* ¶ 18. Although PMW's supporters have been publically disclosed for over two years, the plaintiffs are unable to name anyone who has been harassed, threatened, or otherwise harmed as a result of the disclosure.[4] Given PMW's directly relevant history, it cannot claim to be a "new party" with "no history." *Buckley*, 424 U.S. at 74.

[4] PMW spokesman REDACTED admitted that he has been emailing petition signers and donors, asking them to inform PMW of any instances of harassment or threats that occurred. Dkt. 197-2 Ex. 5, at 30:21 to 33:3. Although the petitions were signed in highly public locations, and the names of donors have been disclosed for over two years, PMW is still unable to name anyone who was harassed after merely signing or donating.

The Supreme Court addressed precisely this issue in *Citizens United v. Federal Election Commission*, 130 U.S. 876 (2010). The Court refused to find harassment based on injuries allegedly suffered in campaigns not at issue in *Citizens United.* The Court stated that Citizens United "offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation." *Citizens United*, 130 S. Ct. at 916. As was the case in *Citizens United*, this Court can already see the effect of disclosure. The State has been disclosing the names and addresses of PMW's donors for over two years. Yet PMW does not allege that the donors have been harassed, or discouraged from exercising their First Amendment right of association.

3. The Alleged Harm Will Not Impact The First Amendment Right Of Association

The plaintiffs' burden requires them to establish not only a reasonable risk of harassment, threats, and reprisals, but also a link between the alleged harm and the ability to exercise the First Amendment right of association. For a minor party, a justified fear of public and government persecution can deter so many people from participating or donating that it impedes the group's ability to associate. For example, in *NAACP*, the Court stated that the severity of the harm would impact the right of association by causing NAACP members to withdraw from the Association, and by creating sufficient fear to dissuade others from joining. *NAACP,* 357 U.S. at 463. In *Brown,* the Court noted that in some cases, a fear of reprisal "'may deter contributions to the point where the movement cannot survive.'" *Brown,* 459 U.S. at 93 (quoting *Buckley*, 424 U.S. at 71).

In this case, there is no need to speculate. The evidence shows that public disclosure of PMW's supporters on a searchable, internet database had no impact on its right of association. The Public Disclosure Commission began disclosing the names and addresses of PMW's donors during the time PMW was gathering signatures. Dkt. 198 ¶¶ 16-18. And yet there is no allegation

that the disclosure impacted PMW's association for the purpose of gathering signatures, or the associational interest in drawing other campaign donors. Nor did disclosure affect PMW's associational interest in persuading the public to participate in the campaign.

Since the election concluded nearly two years ago, no associational right could be impaired by disclosure. As Justice Alito's concurring opinion in *Doe* notes, only before the election is there a possibility that harassment might infringe on First Amendment rights of association by discouraging people from signing petitions or participating in the campaign. *Doe*, 130 S. Ct. at 2822 (Alito, J., concurring). Since there is no risk to association, the extraordinary measure of applying the First Amendment is not an option.

4. The State Has An Indisputably Important Interest In Preserving The Integrity Of The Electoral Process

In a footnote argument, plaintiffs contend the State's interest in public disclosure is "nonexistent" now that the election is over. Dkt. 209 at 5 n.3. The Supreme Court disagrees. In a ruling issued long after the conclusion of the election, the Court held that "[t]he State's interest in preserving the integrity of the electoral process is undoubtedly important." *Doe,* 130 S. Ct. at 2820. The Court explained that allowing the public access to the signed petitions "helps prevent certain types of petition fraud otherwise difficult to detect." *Id.* at 2820. The people of Washington have a "particularly strong" interest in eliminating fraud. *Id.* at 2819. Fraud "'drives honest citizens out of the democratic process and breeds distrust of our government.'" *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

Since PMW is still a registered Washington political committee, the question of whether PMW engaged in fraud continues to be a live issue. Dkt. 198 ¶ 19. As the Court emphasized, public disclosure "helps prevent certain types of petition fraud otherwise difficult to detect, such as out-right forgery and 'bait and switch' fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue." *Doe*, 130 S. Ct. at 2820. Even when each signature is checked, State detection of bait and switch fraud is nearly impossible.

As the Supreme Court recognized, petition signers are best able to detect this type of fraud, "and public disclosure can bring the issue to the signer's attention." *Doe,* 130 S. Ct. at 2820; *Montanans for Justice v. State ex rel. McGrath,* 146 P.3d 759 (Mont. 2006) (finding that signature gatherers used bait and switch tactics to deceptively obtain signatures). The State has an ongoing interest in determining whether Washington's political committees have engaged in bait and switch fraud.

The Ninth Circuit has also recognized that interest in public oversight of the State's election system does not conclude with the election. *Porter v. Bowen,* 496 F.3d 1009, 1013 (9th Cir. 2007). The Court of Appeals held that after an election concluded, a challenge to the legality of the Secretary of State's actions was not moot, because the State could act similarly in future elections. As the Supreme Court noted, mistakes can happen. *Doe,* 130 S. Ct. at 2820. Public review helps "identify and cure the inadequacies of the verification and canvassing process" and can provide confidence in the State's work in upcoming elections. *Id.*

D. Conclusion

Defendants respectfully request denial of Plaintiffs' Motion for Summary Judgment.

DATED this 18th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed under seal the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed this 18th day of July, 2011.

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